Supreme Court, U.S.
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No. 94-788

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF OF RESPONDENTS, CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL., IN OPPOSITION

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I. THIS COURT HAS NEVER DECIDED THAT A DISTRICT COURT IS WITHOUT DISCRETION TO DENY AN APPLICATION FOR PREJUDGMENT INTEREST IN A MUTUAL FAULT ADMIRALTY CASE.

The respondents cite *The Manitoba*, 122 U.S. 97 (1887), in support of their argument that this Court need not hear this petition. The petitioner disagrees with respondents' argument that this Court's decision in *The Manitoba* is germane to the issue in this case, and further disagrees with certain conclusions drawn and statements made by the respondents concerning *The Manitoba*.

The Manitoba gives this Court no guidance on the issue the petitioner seeks to bring before the Court. Respondents state that *The Manitoba* decided that "an award of prejudgment interest in a collision involving mutual fault is proper." (Response p. 2)[1] Implicit in this statement is the conclusion that the Fifth and Eleventh Circuits' rule governing this matter is that an award of prejudgment interest in a collision involving mutual fault is *per se* improper. The rule in the Fifth and Eleventh Circuits, however, is not that an award of prejudgment interest in a collision case involving mutual fault is *per se* improper, but that the existence of mutual fault in a divided damages case constitutes a "peculiar circumstance," which permits the district court the discretion to either award or deny prejudgment interest, based upon

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[1] Respondents' brief is cited as "Response."

equitable considerations. The rule adopted by the Seventh, Ninth, and Sixth Circuits is that prejudgment interest must be awarded in collision cases involving mutual fault, irrespective of equitable considerations. The question of whether or not a district court has discretion to deny or award prejudgment interest in a collision case involving mutual fault was not decided in *The Manitoba*. The inclusion of prejudgment interest in the district court's calculation in *The Manitoba* was a decision within the district court's discretion and would remain so under the rule in effect in the Fifth and Eleventh Circuits.[2]

In respondents' description of *The Manitoba*, several references are made to the Manitoba as the vessel "least at fault" and the Comet as the vessel "to have the greater fault." (Response pp. 4-5) Respondents' description must be based upon respondents' own view of the facts described in the case, because there was no finding made in *The Manitoba* that either vessel was more at fault than the other. The holding of this Court in that case was simply that both vessels were at fault.

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[2] The inclusion of prejudgment interest in the district court's calculation of damages in *The Manitoba* was of no consequence because one-half of the total amount of damages without prejudgment interest was greater than the Manitoba's bond. The Comet and the Manitoba were found to be equally at fault for the collision of the two vessels. Comet sunk with her cargo and was a complete loss, which totaled $57,441.88. The Manitoba was damaged in the amount of $5,000. The Manitoba had given a $28,694.95 bond for release of The Manitoba. This Court found both vessels to be at fault and held that the total damages were to be divided, and awarded the Comet the full amount of the bond, which was less than half of the total damages.

Respondents' comments concerning this Court's holding in *The Maggie J. Smith*, 123 U.S. 349 (1887), obscures the significance of the point that in 1887, there was no requirement that interest be awarded on a bond in a limitation of liability proceeding unless the bond so provided. In *The Maggie J. Smith*, this Court approved of the rule that reserves to the district court the discretion to either award or deny interest on a bond. Although *The Maggie J. Smith* concerned interest on a bond posted in a limitation of liability proceeding, there is little conceptual difference between awarding prejudgment interest and awarding interest on a bond from the time the bond is given until liability and damages are decided.

II. THIS COURT'S DECISION IN *RELIABLE TRANSFER* DID NOT DECIDE THAT DISTRICT COURTS DO NOT HAVE THE DISCRETION TO DENY PREJUDGMENT INTEREST IN MUTUAL FAULT ADMIRALTY CASES.

Respondents argue that *United States v. Reliable Transfer*, 421 U.S. 397 (1975), read in conjunction with *West Virginia v. United States*, 479 U.S. 305 (1987), supports the conclusion that district courts do not have the discretion to deny prejudgment interest in mutual fault admiralty cases. In neither case, however, did this Court address the issue raised in this petition. Respondents concede that *Reliable Transfer* did not address mutual fault in the context of whether or not to award prejudgment interest. (Response p. 7) In *West Virginia v. United States*, this Court held that, under the longstanding federal common-law rule, parties owing debts to the federal government must pay prejudgment interest where the underlying claim is a

contractual obligation to pay money. Because this case is neither against the federal government nor involves a contractual obligation to pay money, it cannot logically be concluded that this Court's decision in *West Virginia v. United States*, read in conjunction with *Reliable Transfer*, somehow decided the issue in this case.

Neither *Reliable Transfer* nor *West Virginia v. United States* consider the concerns which compelled the Fifth and Eleventh Circuits to retain the rule which preserves the discretion of the district judge to deny prejudgment interest in a mutual fault collision case, when it would be inequitable to award prejudgment interest. *See, e.g., Dow Chemical Co. v. Dixie Carriers*, 463 F.2d 120 (5th Cir. 1972). Uncertainty as to liability, degree of fault, and amount of damages which exist in a mutual fault collision case and might result in making an award of prejudgment interest inequitable in a particular case, do not exist in a case based on a contract to pay a liquidated amount on a certain date. Although this Court in *West Virginia v. United States* rejected a balancing of equities approach, it did so in the context of a contract claim for a liquidated amount due on a date certain. A mutual fault collision case is not based on contract and does not involve a liquidated amount due on a date certain. Instead, the final result of a claim in a mutual fault collision case is often highly speculative, because of uncertainty as to fault, degree of fault, and damages. Application of the mechanical rule, favored by the Ninth, Sixth, and Seventh Circuits, can result, and has resulted in this case, in a punitive award of prejudgment interest against a prevailing party, simply because the prevailing party correctly decided to defend itself against a lawsuit brought against

it by the party primarily responsible for the collision. The unintended effect of the mechanical rule applied by the Seventh Circuit in this case is to severely punish the petitioner for successfully defending itself in the case brought against it. Denying prejudgment interest in this case and in similar cases does not deprive a party, who would ordinarily obtain interest on money that was due and owing, of money owed them, because whether or not money was due and owing, in what amount, and to whom cannot be determined until liability and damages are resolved.

Respondents' argument that the First, Second, Third and Eighth Circuits "explicitly or implicitly" held that mutual fault does not constitute a special circumstance justifying a denial of prejudgment interest is not supported by the case law. (Response p. 9) The cases cited by respondents from the First, Second, Third and Eighth Circuits are district court mutual fault collision cases where the district courts, in the exercise of their discretion, awarded prejudgment interest.[3]

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[3] *STARLIGHT I, Inc. v. Patriot Corp.*, No. 83-3783-Z, Slip Op. (D.C. Mass. 1985) (Response App. 6, 16); *Trans Pacific Shipping Co. v. Smith-Rice Co.*, 1992 U.S.Dist. LEXIS 16,017 (N.D. Cal. 1992) (Response App. 19, 35); *Granholm v. TFL Express*, 576 F.Supp. 435, 456 (S.D.N.Y. 1993); *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854, 876 (E.D. Pa. 1977); *Lone Star Industries v. Mays Towing Co.*, 725 F.Supp. 440, 445 (E.D. Mo. 1989), *rev'd on other grounds*, 927 F.2d 1453 (8th Cir. 1991).

III. DEGREE OF FAULT IS RELEVANT TO THE AWARD OF PREJUDGMENT INTEREST IN A MUTUAL FAULT ADMIRALTY CASE.

Respondents' argument that degree of fault of the party seeking interest is irrevelant ignores the reality that the consequence of ignoring fault is that the party who bears less fault, when the party bearing greater fault also suffered greater damages, must bear the greater weight of the cost of delay inherent in the litigation. Moreover, this cost shifting occurs in the context of litigation stemming from the action of the party bearing the greater fault.

The Fifth and Eleventh Circuits' rule recognizes that in certain cases, such as this case, it is inequitable to impose the cost of delay on a party bearing the lesser degree of fault, because to do so penalizes the lesser-at-fault party for legitimately defending its interests against the party bearing the greater degree of fault. To fully understand the injustice which occurred in this case, one must realize that if the respondents are eventually awarded all of the prejudgment interest which they seek, the petitioner would have been better off simply paying the respondents the $6.5 million dollars they demanded in their complaint, than defending itself in court, and proving that its fault is limited to 33 percent rather than 100 percent. Justice at the cost imposed by the mechanical rule adopted by the Seventh Circuit in this case cannot be afforded by anyone.

CONCLUSION

For these reasons and those stated in our petition, we respectfully request the Court to grant the petition.

Dated and signed at Milwaukee, Wisconsin this 14th day of December, 1994.

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